No. 2852

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation

Plaintiff in Error

vs.

SOUTHERN OREGON COMPANY, a corporation; COOS COUNTY; ROBERT R. WATSON, County Clerk of Coos County; A. JOHNSON, Jr., Sheriff of Coos County, and T. M. DIMMICK, Treasurer of Coos County, Oregon; and FLANAGAN & BENNETT BANK, a Corporation,

Defendants in Error

Brief on Behalf of Defendants in Error Coos County and Its Officers

Upon Writ of Error
to the District Court of the United States for the District of Oregon

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POINTS AND AUTHORITIES

I

It is the duty of the county clerk of Coos County, who by virtue of his office is ex-officio clerk of the Circuit court, having or holding in his possession or custody, public funds or money in trust for any person, by virtue of his office, or any money held in custodia legis, to, as soon as practicable pay the same over to the county treasurer. Such moneys shall be paid out in accordance with the order of the court if said money is held in custodia legis.

Chapter 273, General Laws of Oregon, 1913, Sec. 5.

II

In the absence of such a statute it is the duty of the clerk in using due care for the protection of such funds to place them in safe keeping.

5 Ruling Case Law 629, and cases cited.
Agoure vs. Peck, 121 Pac. 708. (Cal.)

III

It was ordered by the circuit court that upon the payment to the clerk of the court by the Southern Oregon Company of the amount of money shown by the tax rolls of Coos county, Oregon to be due from the plaintiff as taxes upon the lands assessed to the said plaintiff as owners, that the sheriff should de-

liver tax receipts. (Paragraph VII, Bill of Complaint.) It is alleged that in compliance with said order of court the Southern Oregon Company drew its check payable to the order of James Watson, who was then county clerk, for the sum of $24,752.62, and that Watson indorsed said check on July 5th, 1913 to Dimmick the county treasurer who deposited it in the Flanagan and Bennett Bank to his account as county treasurer. It is further alleged, that the same procedure was had on March 31st, 1914 with a check in the sum of $35,000.00, also made payable to the county clerk and endorsed by him to the county treasurer and deposited by the treasurer to his account as county treasurer in the Flanagan and Bennett Bank, as well as an additional $3,863.26, totaling $38,863.26.

From these allegations it is very clear that the checks were negotiable and the money received from them was a deposit in the custody of the court. it was in custodia legis, ad it was the duty of the clerk to deposit this money with the county treasurer.

12 Cyc 1024.

Weaver vs. Duncan, 56 S. W. 39, 41.

Bouvier's Law Dictionary, 3rd Ed.—Custodia Legis.

In re Receivership of New Iberian Cotton Mill Co. 33 So. 903,904.

Black's Law Dictionary.—Custodia Legis.

First National Bank vs. Livingood, 109 Pac. 987, 988.

Shumaker and Longsdorff, Cyclopedic Law Dictionary. Custodia Legis.

August vs. Gilmer, 44 S. E. 143.

Gilman vs. Williams, 76 Am. Dec. 219.

Hagan vs. Lucas, 10 Pet. 411 (35 U. S.) 9 L. Ed. 470.

Moore Mfg. Co. vs. Billings, 80 Pac. 422, 424, 46 Or. 401.

Troll vs. City of St. Louis, 168 S. W. 167, 178.

Porter vs. Sabin, 37 L. Ed. 815, citing cases.

Farmers Loan and T. Co. vs. Lake Street E. R. Co. 44 L. Ed. 667, 671.

177 U. S. 52, 62.

IV

It was ordered that the money be paid to the county clerk, the money was brought into court in the form of checks and certificates of deposit made payable to the county official. The checks and certificates of deposit were negotiable instruments and it was the duty of the official to convert them into money. A certified check or a certificate of deposit depends for its validity upon the solvency of the bank. This is a risk that no officer need assume, When a check or certificate of deposit is made to him as an officer under a pleading or order of court allowing the parties to deposit money, or where they plead that they bring money into court, it is the plain duty of the officer to turn the negotiable in-

strument into money. Upon its being converted into money it was the duty of the clerk to deposit it with the treasurer, who has a right to deposit it with a county depository if it is a public fund and it is his duty to do so; it is probably also the duty of the treasurer to deposit moneys held by the court in custodia legis in the county depository. It is a least proper for him to deposit them in a bank for safe keeping and his duty to do so.

5 Ruling Case Law p. 629 and cases cited.

Agoure vs. Peck, 121 Pac. 708.

Standard Encyclopedia of Procedure, Vol. 7, page 157.

Burke vs. Trewitt, 4 Fed. Cas. No. 2163.

Cyc. on Clerks of Court.

V

We contend that the fund mentioned in the Bill of Complaint was a fund in court under all the authorities, and the court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost either by the abatement of the suit or by the dismissal of the bill. The court by proper orders in the case where the fund has been brought into court will make such a disposition and distribution of the fund as is proper.

13 Cyc. 1038, cases cited.

Wright vs. Mitchell, 18 Vesey Jrs. Rep. Sumner's Ed. 293.

Sturdivant vs. Reese, 111 S. W. 261.
Standard Cyclopedia of Procedure, Vol. 7, p. 171, 170.

VI

The only remedy the Menasha Wooden Ware Company has, if they are entitled to the repayment of the money at all, is to file a petition to intervene in the case of Southern Oregon Company vs. W. W. Gage, in the Circuit Court of Coos County, Oregon, and petition the court for an order directing the payment to them of the money in question. This must be done by petition or motion, and upon notice to all the parties interested. The question as to whom the fund belongs will then be determined by the circuit court. If his decision is erroneous, the parties have their right of appeal to the Supreme Court of Oregon and possibly then by Writ of Error to the United States Supreme Court. This procedure for the return of the money is taken after final judgment and time for appeal has elapsed, and not while an appeal is pending. This procedure was taken by the Southern Oregon Company in the Circuit Court of Coos County, Oregon, and argued out before Judges J. S. Coke and G. F. Skipworth, but relief at that time was denied, due to the fact that a Writ of Error had been taken to the United States Supreme Court from the decision of the Supreme court of Oregon in the case of Southern Oregon

Company vs. W. W. Gage. No mandate had come down from the United States supreme court when this was filed and until it did no court had power to order distribution of the fund.

7 Standard Encyclopedia of Procedure 167, 170, 171, and large number of cases cited.

VII

A fund paid into court cannot be withdrawn or distributed except upon the court's order. No other court has jurisdiction to determine any question pertaining to the distribution of the fund. The rights of claimants to a fund deposited in court cannot be determined in another suit even after final decree. The court first acquiring jurisdiction of a fund has a right to retain it until the cause is finally disposed of, and its jurisdiction is not subject to be ousted by a court exercising a concurrent jurisdiction. This is particularly true of State and Federal courts. Where property is in the lawful possession of a state court, it cannot be seized by process issuing from a federal court.The state court has a right to keep property in its possession even though there are defects in the process by which it acquired possession. Property in the custody of a court is under its control and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession or some superior jurisdiction in the premises.

This rule applies whether the property was taken upon attachment, execution, replevin, by receivership, by suits to enforce liens, to marshal assets, administer trusts, liquidation of insolvent estates or where property is voluntarily brought into court and certain action in reference thereto demanded.

Chap. 273, Laws of Ore. 1913, Sec. 5.

4 Ency of U. S. Supreme Court Reports, 1170 1172, 1173, 1175, and cases cited.

7 Standard Encyclopedia of Procedure, 167, 173, and cases cited.

Craig vs. The Governor, 43 Tenn. (3 Coldwell's Reports) 244.

Allen vs. Gerard, 21 R. I. 467, 79 Am. St. Rep. 816, 44 Atl. 592.

Covell vs. Heyman, 111 U. S. 176.

Senior vs. Pierce, 31 Fed. 625.

Tefft, Weller & Co. vs. Sternberg & Lowenherz, 5 L. R. A. 221, and notes.

Tuck vs. Manning. 5 L. R. A. 666, 22 N. E. 1001.

Martin vs. Shannonhouse, 203 Fed. 517.

Reinhold vs. Olof Hannson, 169 Ill. App. Ct. Rep. 334.

First National Bank vs. Londonderry Mining Co. 114 Pac. 313.

Corbitt vs. Farmers Bank of Deleware, 114 Fed. 602.

Gregory vs. Merchant's National Bank, 50 N. E. 520.

Gregory vs. Boston Safe Deposit & Trust Co. 53 N. E. 889.

Jones vs. Merchants Nat. Bank of Boston; Gregory vs. Same; Gregory vs. Boston Safe Deposit & Trust Co., 76 Fed. 683.

Gregory vs. Boston Safe Deposit & Trust Co. 144 U. S. 665, 36 L. Ed. 585.

Freeman on Executions, 3rd Ed. Sec. 135, P. 606 Sec. 129.

Herman on the Law of Executions, Sec. 173.

VIII

The county treasurer and clerk of Coos County are subject to the orders of the Circuit Court of that county not to the orders of the District Court of the United States in this case. They had no power upon the demand made upon them to pay out any money deposited with them without an order of court. If they had they would have been liable to an action by Coos county or a tax payer. Officers of Coos county ready to obey the orders of the court having control of the fund cannot be harrassed by suits in another forum.

Craig vs. The Governor, supra.

Gregory vs. Boston Safe Deposit & Trust Co., 76 Fed. 683.

IX

The cases cited above in Points and Authorities

VII, in themselves, effectually dispose, we believe, of every theory which can be advanced by the Menasha Wooden Ware Company for a recovery in this action. The court has no jurisdiction to try this case. Hereafter is found a complete discussion by the judges of the cases cited herein.

X

Furthermore, plaintiff has mistaken his remedy in bringing an action for money had and received. At 3 Sutherland on Pleading and Practice, Sec. 5039, it is said: "An action will lie to recover a sum certain whenever one has the money of another, which he in equity and good conscience has no right to retain. If he knows it belongs to another and knows it is his duty to pay is over, he may be sued for money had and received." In this case, there is nothing in the pleadings to show that Coos county has any money of the plaintiff, nothing to show that Alfred Johnson, Jr., Sheriff has any money of the plaintiff, nothing to show that Robert R. Watson, County Clerk has any money of the plaintiff. The complaint further shows that the money received by Dimmick the county treasurer was received from an officer of the court, the clerk. The privity between Dimmick and the court is the only privity shown. And likewise the privity between the banks and Dimmick is the only privity shown.

27 Cyc. 857, 859.

XI

Where money is paid to a person who receives it with a good conscience and uses no deceit or unfairness in obtaining it, assumpsit for money had and received will not lie to recover it.

27 Cyc. 849.

XII

The law never implies a promise to pay unless duty creates the obligation and more especially it never implies a promise to do any act contrary to duty or contrary to law. The law will not imply a promise by a public officer to pay money in his hands as such officer twice, nor to pay it to a private party in a case where the law requires him to pay it into the public treasury, and he has complied with that requirement.

Cary vs. Curtis, 3 How. 236, 249, 251, 11 L. Ed. 576.

Barr vs. Craig, 2 Dall. 151, 1 L. Ed, 327.

Rapalje vs. Armory. 2 Dall. 51, 54, 1 L. Ed. 285.

The Collector vs. Hubbard, 12 Wall. 1, 12, 20 L. Ed. 272.

XIII

Suppose this court should give a judgment to the plaintiff against the defendant T. M. Dimmick and the bank in this case. Then when the mandate

came back from the Supreme Court of the United States in the case of Southern Oregon Company vs. W. W. Gage, the county should intervene and petition the court for an order applying the money deposited on the taxes due the county on the lands of the Southern Oregon Company and the court should enter a judgment and order directing the Treasurer and the Bank to pay the money over to the Sheriff to apply on delinquent taxes, what then? The mere statement shows that under the cases last cited that an action for money had and received will not lie against the defendants.

XIX

Money paid into court is an admission that the amount paid in is due on some contract or other.

9 Ency. of Plead. & Prac. 736, 735.

Brown vs. Feeney, 54 The Weekly Reporter 445.

94 Law Times Rep. N. S. 1906, p. 463.

Hosmer & Another vs. Warner, 73 Gray's Rep. 186.

Deposits in Court, Standard Cyclopedia of Procedure.

XV

There is a misjoiner of parties defendant in this case.

Cowart vs. Fender, American Annotated Cases, 1913A, p. 932.

Note to same, page 935.

ARGUMENT

It appears from the averments of the plaintiff's Amended and Supplemental Complaint that the Southern Oregon Company, the assignor of the plaintiff paid to the County Clerk of Coos County, Oregon, and who was ex-officio Clerk of the Circuit court of Coos County, Oregon, the sum of money alleged in the suit of the Southern Oregon Company vs. W. W. Gage as Sheriff and Tax Collector of Coos County, pursuant to the averments of the complaint of the Southern Oregon Company, and an order of Court made and entered in said suit, a copy of which order it set forth on pages nine and ten of the transcript of record of Plaintiff in Error. From this transcript it appears that the Southern Oregon Company owned, or claimed to own certain lands in Coos County Oregon upon which the taxes levied by the County were delinquent, and this Company, fearing that the lands might be sold for taxes by the County and not desiring to pay the taxes to the County while litigation was pending with the United States which sought to forfeit the title to all said lands and revest the same in the Government, brought the said sum of money into Court pursuant to the order above mentioned. This money was delivered by the Clerk of Coos County to the Treasurer of Coos County who has deposited the same in the defendant bank. The defense of the Defendants in

Error in this case is that the Circuit Court of Coos County Oregon has jurisdiction of this fund which is a deposit in court to the exclusion of every other court, secondly that an action for money had and received will not lie against defendants for this money, and thirdly, there is a misjoiner of parties defendant.

Section five of Chapter 273, General Laws of Oregon, 1913 provides as follows:

> "It shall be the duty of all public officers excepting clerks of school districts, having and holding in their possession or custody, public funds or money in trust for any person, by virtue of their office, or any money held in custodia legis, to, as soon as practicable pay the same over to the county treasurer, if the same be held by a county officer, or to the State Treasuer, if the same be held by a State officer.....All moneys so paid over to the county treasurer, as aforesaid, or to the State Treasurer, as the case may be, shall be paid out by the county treasurer as the case may be, in accordance with the order of the court if said money is held in custodia legis, or to the persons to whom said money properly belongs, if otherwise held."

California has two similar statutes, Sec. 573 of the Code of Civil Procedure, and Section 2104 of the same code. In the case of Agoure vs. Peck, it ap-

peared that Agoure was defendant in an action brought by one Lewis and brought into court and tendered $1000 in the form of a certificate of deposit with the clerk to the plaintiff. The clerk kept the certificate for a time and then deposited it with the county treasurer who neglected to have it cashed. The bank on which the certificate was drawn became insolvent and the treasurer was sued on his official bond and the judgment of the lower court holding the treasurer liable was affirmed. The supreme court said:

> "When the treasurer received this certificate of deposit, under the terms of the judgment of the court, he could only receive the same as money, and it was his plain duty to have reduced the money, certified to be payable upon the presentation of the certificate, to his possession and to have safely kept the same until disbursed under authority of law. Failing to do this, he was guilty not only of a violation of the law, but of gross negligence in the management and care of this property. . . . His retention of the certificate of deposit, payable upon demand, was in legal effect but a loan to the bank of the money in his possession, a thing which by law he is prohibited from doing, and he cannot be heard to excuse himself upon the ground that he acted in good faith, believing the bank to be solvent."

Page 708, Volume 121 Pac. Rep.

5 Ruling Case Law. p. 629 cites as follows:

"The clerk of a court as a public ministerial officer is answerable in a civil action for any act of negligence or misconduct whereby damages results to the party complaining, and this liability extends not only to his own acts but to those of his deputies performed within the scope of their official duty.....The principle is unquestioned that public officers should be held to a faithful performance of their official duties, and made to answer in damages to all persons who may have been injured through their malfeasance, omission or neglect, to which the persons injured have in no respect contributed, and the courts uniformly apply this law to the negligence, carelessness and misconduct of clerks of courts."

Note in Volume 7, Standard Encyclopedia of Procedure, 157.

"Generally speaking the liability of the clerk and his bondsmen for a loss of the fund in his keeping depends on the rule of the particular jurisdiction respecting the measure of liability of public officers for moneys in their hands. Thus, we find doubt expressed as to any liability on the ground that it is not public money (Rhea vs. Brewster, 130 Ia. 729, 107 N. W. 940), while in other jurisdictions the rule of liability as in cases of bailment is upheld (Wilson

vs. People, 19 Colo. 199, 34 Pac. 944). But in some states the liability is absolute. Northern Pac. R. Co. vs Owens, 86 Minn. 188, 90 N. W. 371."

Burke vs. Trewitt, 1 Mason 96, 4 Fed. Cas. No. 2163:

"In respect to property in the custody of officers of the court, pending process, they are undoubtedly responsible for good faith and reasonable diligence. If the property be lost or injured by a negligent or dishonest execution of their trust, they are liable in damages; but they are not, of course, liable, because an embezzlement or theft is proved. They must be affected with culpable negligence or fraud, and such is the confidence the court places in its officers that perhaps the proof of such negligence, or fraud, ought to be thrown on the other party."

DEFINITIONS OF CUSTODIA LEGIS

Custody of the law. 12 Cyc. 1024.!

In the custody of the law. Bouvier's Law Dictionary, Rawle's Third Rev. Vol. 1, p. 741.

In the custody of the law

Black's Law Dictionary, (2nd Ed.) Citing: Stockwell vs. Robinson, 32 Atl. 528.

In the custody of the law.

Shumaker and Longsdorf, Cyclopedic Law Dictionary.

Property lawfully taken by authority of legal process is in the custody of the law.

Gilman vs. Williams, 7 Wis. 329, 334, 76 Am. Dec. 219.

Weaver vs. Duncan, 56 S. W. 39, 41.

Property legally in the hands of a receiver is in custodia legis.

Weaver vs. Duncan, 56 S. W. 39, 41.

In re Receivership of New Iberia Cotton Mill Co. 33 S. 903, 904.

A thing is in custodia legis when it is shown that it has been and is subjected to the official custody of the judicial executive officer in pursuance of his execution of a legal writ, and where property attached is sold under order of the court and attachment is dissolved, the proceeds are in custodia legis.

First Nat. Bank vs. Livingood, 109 Pac. 987, 988 (Kan.)

Property levied on remains in custody of the law.

August vs. Gilmer, 44 S. E. 143.

Hagan vs. Lucas, 10 Pet. 411, (35 U. S.) 9 L. Ed. 470.

The filing of a petition in bankruptcy and the adjudication thereon operated to place the property of the bankrupt in the "custody of the law."

Moore Mfg. Co. vs. Billings, 80 Pac. 422, 424, 46 Or. 401.

One charged with crime and at large on bail is constructively in the custody of the law.

Netograph Mfg. Co. vs. Sorugham, 90 N. E. 962, 963, 197 N. Y. 377.

27 L. R. A. N. S. 333, 134 Am. St. Rep. 886.

Custodia legis involves the actual domination over some objective thing by the court. It may be corpo-

real or incorporeal, but it is not a controversy, a question, or an inquiry.

Troll vs. City of St. Louis, 168 S. W. 167, 178

Property in hands of receiver is in custodia legis

Porter vs. Sabin, 37 L. Ed. (U. S.) 815, citing cases.

FARMERS LOAN & T. CO. vs. LAKE STREET ELEVATED R. CO. 44 L. Ed 667. 671, 177 U. S. 52, 62.

The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of other co-ordinate jurisdiction from exercising a like power. . . . . Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts.

DISTRIBUTION OF MONEY IN CUSTODIA LEGIS

13 CYC 1038.

> "The court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost either by the abatement of the suit or by the dismissal of the bill."

13 CYC 1038.

> "The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there."

WRIGHT vs. MITCHELL, 18 Vesey Jrs Rep. Sumner's Edition, 293. The bill was filed on behalf of the plaintiff and all other creditors of an intestate for an account, and to set aside the assignment of a lease by the intestate to two of the defendants in trust for a third. The tenants of the premises, being also made parties, paid the rent into court. The bill having been dismissed for want of prosecution, a motion was afterwards made by the assignees of the lease, that the money in Court should be paid out to them.

The Order was made; but the Register declining to draw it up, on the ground that, the Bill having

been dismissed, the Court had no jurisdiction, the motion was repeated. The Lord Chancellor (Eldon) said, the Court had jurisdiction to make an order for payment of the money out of Court, and directed the order to be drawn up.

STURDIVANT vs. REESE, 111 S. W. (Ark.) 261.

> "It would be anomalous to say that a court loses power to require its commissioners to distribute funds which have come into their hands as officers of the court, and by virtue of the orders of the court. Payment under orders of the court to a commissioner or other functionary appointed by the court is equivalent to a deposit in court, and the court has exclusive jurisdiction to order a distribution."

7 Standard Encyclopedia of Procedure. p. 169.

> "The rights of claiments to a fund deposited in court cannot be determined in another suit even after final decree."

Citing:

Gregory vs. Boston Safe Dep. & Tr. Co. 144 U. S. 665, 36 L. Ed. 585.

Corbitt vs. Farmers' Bank of Delaware, 114 Fed 602.

Allen vs. Gerard, 44 Atl. 592, 49 L. R. A. 351, 21 R. I. 467.

ID. p. 171.

"A fund paid into court cannot be withdrawn or distributed except upon the court's order. Citing:

Hammer vs. Kaufman, 39 Ill. 87.

Walters-Cates vs. Wilkinson, 92 Ia. 129, 60 N. W. 514.

Boggs vs. Com. 76 Va. 989, following Osburn vs. U. S. 91 U. S. 474.

ID. p. 173:

"No other court has jurisdiction to determine any question pertaining to the distribution of the fund." Citing

CRAIG et als. vs. THE GOVERNOR, for the Use of White, Adm. 43 Tenn. (3 Coldwell's Reports), 244.

Syllabus. A fund in custodia legis and under the control and subject to the orders and decrees of the chancery court, cannot be paid out by the Clerk and Master of the court, to any one, except in obedience to the order of the court; and a party cannot resort to a different forum and recover of the clerk and master of the chancery court and his sureties, the money, and thus oust the chancery court of its jurisdiction of the same."

4 ENCY. of U. S. Supreme Court Rep. p. 1170.

"The court which first acquires jurisdiction of a case has a right to retain it until the cause is finally disposed of, and its jurisdiction is not

subject to be ousted by court exercising a con
current jurisdiction."

ID. p. 1173.

"The rule that the court having possession o
property has a right to deal with it to the exclu
sion of other courts of concurrent jurisdiction i
of special importance in its application to stat
and federal courts. As between a state an
federal court the one first seizing property ha
exclusive jurisdiction."

ID. p. 1175. Where property is in the lawful pos
session of a state court, it cannot be seized by proc
ess issuing from a federal court.

ALLEN vs. GERARD, 79 Am. St. Rep. 816, (2
R. I. 467. 44 Atl. 592.) P. 817-818. Citing Cases.

"Public officials are charged with certai
well defined duties, and the law prescribes th
manner in which they shall be performed. If
while in the discharge of these duties, the office
is interferred with by some person who is a
stranger to the proceedings, confusion and in
convenience will necessarily be the result, new
complications will arise, and a multitude of suits
be made possible where there should have bee
but one. And in order to avoid such inconven
ience and confusion, the principle has very gen
erally been established that 'no person deriving
his authority from the law, and obliged to exe
cute it according to the rules of law can be hold

en by process of this kind.'.....Here the money sought to be reached is in the registry of the court, and hence undoubtedly in the custody of the law. It was placed there in pursuance of the statute. The clerk of the court, as such, has no control over it, nor is he any way liable for it, except as the custodian of the court. He holds the money in his official capacity only, and can only pay it out as ordered by the court."

COVELL vs. HEYMAN, 111 U. S. 176.

A marshal of a court of the United States had possession of property by virtue of a levy under a writ of execution issued upon a judgment recovered in a Circuit Court of the United States. An action of replevin for the property was brought against him in a state court and taken on writ of error from the decision of the Supreme Court of the state to the U. S. Supreme court. The United States supreme court after discussing Freeman vs. Howe, 24 How. 450 and Taylor vs. Carrol, 20 How. 583, says:

"The point of the decision in Freeman vs. Howe, supra is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any State court, because to disturb that possession

would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject matter. And vice versa, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and the laws of the United States." P. 179. 160.

The court then discusses subsequent decisions by that court, and quotes the following opinion from Mr. Justice Miller:

"That principle is that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under

its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." P. 180.

The court says further:

"Here it will be perceived that no distinction is made between writs of attachment and executions upon judgments, and that the principle embraces both, as indeed both are mentioned as belonging to the same class elsewhere in the opinion." p. 181.

Again:

"The forebearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are

independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. 'The jurisdiction of a court,' said Chief Justice Marshal, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.''. . . .Pages 182-183.

"Property thus levied on by attachment, or taken in execution, is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim of and color of that authority, without respect to the ultimate right, to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other juris-

diction that attempts to dispossess him." p. 184.

SENIOR et al. vs. PIERCE et al. 31 Fed. 625.

Cause was before the court upon the application of the plaintiff to attach Frank Pierce for contempt. The alleged contempt consisted in the refusal of Pierce to deliver to the U. S. Marshal, in obedience to the command of a writ of replevin issued in said cause, certain spirituous liquors, valued at about $6000, which said Pierce had seized under the Iowa liquor law, under a warrant issued from a justice of the peace court.

The court said:

"We live under two separate and distinct governments. In this respect our situation is peculiar, since there is not, perhaps, under the sun, another people subject to the rule of more than one government. While neither of the govenrments over us is absolutely sovereign, each is clothed with certain sovereign powers, to be exercised within the limits of the fundamental law, and each is supreme within its proper sphere. One of the most difficult problems in our polity has always been to define the limits of our two governments and keep each in its true orbit. There are, in this dual system, two judicial organizations, for the most part quite inde-

pendent of each other. With very few exceptions there is no appeal from one of these jurisdictions to the other. They have no judicial power over each other; they cannot revise each other's judgments. There is no common superior to bring their decisions into harmony, and prevent conflict between them. In most cases, the courts of the two jurisdictions exercise concurrent judicial power. They are employed in administering justice, and in enforcing the same laws, within the same territorial limits, over the same persons and subject matter. It is manifest that in so complex a judicial system there must arise, with respect to both persons and property, many causes of conflicting jurisdiction; and it were needless to dwell upon the intolerable mischiefs which must have resulted from such conflicts if they had not been averted by a wise and timely course of judicial decisions. The danger of such conflicts has been from the first imminent; and yet, the courts, state and federal, have for nearly a century exercised their judicial functions side by side, over the same people and territory, in cases mostly of concurrent jurisdiction, with but little discord, warring or conflict.

"How has this most desirable harmony been attained? We owe it beyond doubt to the wisdom of the supreme court of the United States in planting deeply in our legal system the principle that where a court of either jurisdiction

has, by legal process, custody of persons or property, the courts of the other jurisdiction shall not attempt to wrest such persons or property from the court first obtaining possession of the same. Again and again has this principle been laid down by the supreme court, as will seen by the authorities cited below. That court has put its decision upon the ground that the possession of the officer of a court under legal process is the possession of the court, and that an attempt to wrest persons or property from the custody of the officer is an invasion of the jurisdiction of the court." Citing cases. Pages 626-627.

The court then cites and quotes from decisions of the U. S. supreme court, and continues:

"Since, then, property in the hands of an officer of a court under legal process is to be considered as in the custody of the court, the officer would clearly have no right to surrender it without the order of the court, to whom he owes obedience; and therefore an attempt of an officer of an alien jurisdiction to take the property out of the possession of the officer holding it must, inevitably, either prove futile or lead to a forcible collision. Would the officer in possession be justified in surrendering the property at the mandate of a court foreign to him, and without any power whatever to give him protection against the or-

ders of his own court? Would it not be his duty to resist by force the attempt of an officer of a different jurisdiction to take the property from his custody? Can the officer in possession be required to determine for himself, in advance of the judgment of his own court and of the court from which the writ of replevin issues, the right of the plaintiff suing out a replevin from an alien jurisdiction to the property in dispute, and the authority of the officer serving the writ of replevin to seize and take the property? And can an officer be adjudged to be in contempt, and punished for his disobedience to the process of an alien jurisdiction, while acting in obedience to the command of his own court, in refusing to deliver up property which he holds as the mere custodian of that court?"

"The state and federal courts of original jurisdiction are independent of each other. They are equal in power and dignity. The courts of one jurisdiction have no authority or right whatever to command or coerce the courts of the other jurisdiction. How, then, could the federal court take property from the custody of the state court, against its consent, without the use of actual force? But if one jurisdiction may use force, why not the other? Why, if the federal court may exert force to take property from the possession of a state court, may not the latter, in its turn, wrest property from the

federal court by the same means? Nothing is more evident than that whatever a federal court may lawfully do to take property from the state court the latter may also, in like circumstances, do to withdraw property from the possession of a federal court. This power, if it exists, must be reciprocal. It cannot, in the nature of things, be one-sided and exclusive in the federal courts. It would be most unreasonable for the federal courts to assert and exercise a power of seizing property in the custody of a state court, and deny to state courts of co-equal power authority to interfere in like manner with the possession of property held by a federal court. The federal tribunals would therefore but for the principle of mutual non-interference, be exposed to an invasion of their jurisdiction by the state courts, which they are certainly neither ready nor willing to permit. The evil consequences flowing from the interference of the two jurisdictions with their respective rights of possession would by no means end with the scenes of violent collision which must inevitably occur. The taking of the possession of the property by one court from another would not in the slightest degree affect the jurisdiction of the latter to hear and determine the controversy between the parties. The invaded court could not be prevented from proceeding to judgment upon the subject-matter of the suit. Hence would inevitably arise divers and con-

flicting judgments by two courts of concurrent jurisdiction upon the same controversy, and property, within the same territorial limits, without any common superior tribunal to settle and adjust the conflicting rights and titles thus created. Thus, by the judgment of a court of one jurisdiction, the right of property might be established in one suitor, while, by the decision of a court of the other jurisdiction, the title might be adjudged to his adversary; and the right of either party would be made to depend upon the forum in which it should happen to be challenged.....The case was appealed from the judgment of the justice of the peace to the state district court, and the property is now, therefore, in the custody of that court. How is this court to obtain possession of it without the consent of the state district court, unless by a resort to force to wrest it from the custody of the officer of that court? Suppose we decide that the proceeding was irregular, and the seizure without warrant of law, and void, and suppose the state court shall hold just the contrary, how is the conflict of judgment between us to be settled? And, if one court or the other shall not yield, how is a collision of force to be avoided? Why should the state court, which first got possession of the property and the controversy, yield to the claim of jurisdiction by this court? By what right, law, or authority, can this court claim superiority to the state

court, or any paramount competency, to hear and determine the matter at issue?

"Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The state court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the state court. If the federal court may decide the question of the regularity of the seizure and jurisdiction adversely to the state court and proceed to take the property from its custody by force, why may not the state court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by writ of replevin to dispossess the marshal? But assuredly, if the federal court were in possession by legal process, it would not permit the state court to decide the question of jurisdiction and wrest the property from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the supreme court of the state, or of the United States, as the case may require. It will not do for the

suitor to assume that he cannot obtain justice in one jurisdiction or the other. But in all events, it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdiction." P. 626-632.

TEFT WELLER & CO. vs. STERNBERG & LOWENHERZ 5 L. R. A. 221,—Fed,—

Bills by complainants against defendants, an insolvent firm, and J. G. Barnes, sheriff of Muscogee County, and creditors of the firm, for an injunction, receiver, etc. to take charge of the assets of said firm then in the custody of a state court, and in charge of the said sheriff, an officer of the court. The court after citing and quoting from the decisions of the U. S. Supreme court says:

"In a case like that before the court, the court first taking jurisdiction of the substance of the litigation should dispose of all the incidents. It is true that there will be, doubtless, a balance of some amount in the hands of the sheriff after the more important liens there depending are satisfied; and, this court might be justified, by the letter of the law, in appointing a receiver, to whom the sheriff would account for such balance. This, however, would not accord with that spirit of absolute reserve,

which in the matters of concurrent jurisdiction, should mark the action of the courts of the United States toward the state courts. The superior court of Muscogee county has the same power to dispose of all the matters in litigation that would obtain here. It is therefore presumably unnecessary, were it otherwise seemly and appropriate, to go forward and grant the extraordinary relief sought." Page 225.

TUCK vs. MANNING et al and Tuck, Petitioner in HOLMES vs. SAME and SOPER vs. Same, 5 L. R. A. 666, (22 N. E. 1001.)

Tuck, the plaintiff and petitioner, when he filed his bill and petitions, held a promissory note signed by Manning, and he brought the suit in equity against Manning and John Noble, the clerk of this court, to reach and apply to the payment of this note the right, title and interest of Manning in certain sums of money which had been paid into court by the plaintiffs in two suits named in the bill, in which Manning is a party defendant. The plaintiff also filed petitions in these two suits asking that the payment of money to Manning by the clerk might be stopped, and that he might have such relief as he was entitled to. These sums of money were and are held by Noble as clerk, subject to the order of the court in the suits respectively in which they were paid in; and decrees have been entered in the suits, ordering portions of the sums to be

paid to Manning, but the payments to him have not yet been made. Some time after the bill and the petitions were filed the plaintiff recovered judgment in the supreme court of New York against Manning on his promissory note in a suit which was pending when the bill and petitions were filed, and he was permitted to amend his bill by setting out this judgment. The court, by Field, J. says:

> "The custody which Mr. Noble has of the money is the custody of the court and he must obey the orders of the court made in the suits respectively in which the moneys have bee deposited, and he cannot be made a party to independent proceedings either in this court or in any other whereby the disposition to be made of the moneys can be affected or controlled. Columbian Book Co. vs. De Golyer, 115 Mass. 67: Jones vs. Jones. 1 Bland. Ch. 443; Wilder vs. Bailey, 3 Mass. 289; Drake, Attachm. Sec. 257." Page 666.

D. B. MARTIN CO. vs. SHANNONHOUSE, 203 Fed. 517.

Motion made by plaintiff to order the payment to it of money in the registry. It appears from the record and affidavits filed: That at the October term, 1912, of this court, at Elizabeth City, Plaintiff recovered judgment against the defendant for the sum of about $2100. That on or about the 16th day

of January, 1913, defendant paid to the deputy clerk at Elizabeth City the full amount of the judgment and the costs taxed against him. That soon after the payment of said amount the sheriff of Pasquotank county served upon the deputy clerk a warrant of attachment sued out of the superior court of Perquimans county in an action pending in said court, wherein the defendant H. T. Shannonhouse is plaintiff, and plaintiff D. B. Martin Company is defendant. The money was in his hands at the time said warrant was served upon said deputy clerk. It had not been deposited by him. He made with the sheriff an arrangement that the money should be deposited in the bank in the joint name of himself and said sheriff for the purpose of protecting both officers and to await the determination of the attachment proceedings. Plaintiff demanded of said deputy clerk that he pay to it the said money, which demand was refused for the reason that the same had been attached in his hands. Plaintiff, upon notice to defendant, moves the court to order the deputy clerk to pay over to it the said money notwithstanding the service upon him of the warrant of attachment. The court says:

Connor, District Judge.

"Before disposing of the question as to whether the money in the hands of the clerk was subject to attachment, it will be well to

direct the attention of the clerk and his deputies to the statutory provisions prescribing their duty in regard to funds coming into their hands by virtue of judgments or decrees of the court:

"'All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court.' Rev. St. 995, U. S. Comp. St. 1901, p. 711, 5 Fed. 813. Ann. 70, Fagan vs. Cullen (c.c.) 28 Fed. 843.

"It is further provided that:

"'No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in, or account from which, it is drawn.' Id. Sec. 996.

"It was the uniform custom of the several clorks in this district, and since the enactment of the Judicial Code, is now the custom of the clerk and his deputies, to immediately deposit money coming into their hands as directed by the statute. The deputy clerk at Eliazbeth City, supposing some other and dif-

ferent duty under the circumstances, deposited the money to the joint credit of the sheriff and himself. In this he was in error. Under any circumstances, assuming that the money paid to him in satisfaction of the judgment was subject to attachment, or himself to garnishment, the sheriff had no authority to take the money from his possession, or interfere with him in the discharge of his official duty, as prescribed by the statute . . . . An order will be drawn directing the deputy clerk to forthwith deposit the amount received by him from defendant Shannonhouse on account of the judgment recovered by the plaintiff herein in the depository designated for that purpose. A copy of said order delivered to the bank in which it is now deposited will be sufficient authority for the withdrawal of the amount and its deposit as herein directed . . . . The question then arises, Is the money deposited in the depository designated by law to the credit of the court subject to attachment by the sheriff of Pesquotank county? The decision of this question does not call into controversy or involve the validity of the process of the state court. This court has not any such authority or power.

"The sole question is whether the money in the custody of this court is subject to be attached or this court's control of it, in any degree, affected by the action of the sheriff in

respect to the warrant of attachment. The warrant did not direct the sheriff to levy upon, or attach, this specific money, but only the property of the defendant in his county. The power and duty of a court to decide for itself whether property in its possession or under its control can be taken from it by process issuing from another court is essential to its right and duty to administer to its suitors such remedy, as according to the law they may be entitled, and to enforce its judgments. Chief Justice Marshal, in Wayman vs. Southard, 10 Wheat. 1, 6 L. ed. 253, says:

> " 'The jurisdiction of a court is not exhausted by the rendition of its judgment, but continued until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised.'

"It is therefore generally held that property in custodia legis is not subject to attachment. 3 Stand. Enc. Pro. 280. The question presented here has been decided in a well considered opinion in which all of the decided cases ar cited, by District Judge Waddill, of the Eastern District of Virginia. In Corbitt vs. Farmers Bank (C. C.) 114 Fed. 602, he says:

" 'The position taken by counsel for complainant, that the court, having entered its final

order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to defendant bank, is equally fallacious. A conclusion in favor of parties litigant, to any controversy, would be barren of good, if the court rendering the decision was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result as to money in the court's own registry would indeed, leave it in a helpless and pitiable plight.'

"As clearly and forcibly pointed out by Judge Waddill, to hold otherwise would result in unseemly conflicts between state and Federal courts, involve their officers and suits in difficult and frequently doubtful questions and result in endless confusion. The courts generally hold that to permit funds in their possession to be subject to attachment would be contrary to public policy. Clark vs. Shaw, 26 Fed. 356; In re Forsyth, 78 Fed. 296.

" . . . . The statute of North Carolina directs that money paid to the clerk shall be paid by him 'to the party entitled to receive it,' whereas, money paid to the clerk of the Federal court is to be deposited by him in the depository designated to the credit of the court, and can only be drawn *out by the order of the court. It remains under the control of the court, and is*

not subject to the orders or process of any other jurisdiction. The deputy clerk should not have cancelled the judgment. His sole authority in the premises was to receive the money and deposit it, as directed. The application and disposition of it could be made only by the court."

Pages 518-521.

Reinhold vs. Olof Hansson. 169 Ill. App. Ct. Rep. 334.

Reinhold filed his bill in the Superior Court against Hansson and others to foreclose a trust deed. During pendency of suit, money due was paid into court. Thereupon the suit was dismissed without mentioning to whom the money should be paid and plaintiff appealed.

The Court said:

"Complaint is made because the decree fails to direct the payment of the money to appellant. This complaint, made as justifying this appeal, is more chimerical than substantial. The money, having been paid to the clerk with the knowledge and sanction of the court, became a fund custodia legis, to be paid out upon the order of the court. Hammer vs. Kaufman, 39 Ill. 87, Ferguson vs. Sutphon, 8 Ill. 547.

"Upon motion in the court below appellant might readily have procured an order directing

the clerk to pay the money to him, and thereby avoided this appeal. If the attention of the court had been directed to the failure of the decree to award the payment of the money to appellant, the decree would, doubtless, have been so drafted as to accomplish that result."

Page 336.

First Nat. Bank vs. Londonderry Mining Co. 114 Pac. (Col.) 313.

In a suit concerning the ownership of ores, it was ordered that the proceeds of such ores be placed in the registry fund of the court, and that the clerk deposit the fund in some bank which should be required to give a bond. Thereafter an order was entered that the moneys on deposit be equally divided between the parties, and the parties filed a petition which resulted in an order against the bank to show cause why it should not pay a specified sum. The bank filed an answer, and a trial was had which resulted in the entry of judgment against the bank. The bank contended that there was no jurisdiction, in that it was not a party to the action, and not bound by any orders others than the one to show cause and that the action must be on the bond of the bank, and its sureties, wherein a summons must issue in the name of the people and that there was no statute authorizing a judgment.

The court said:

"The first question necessary to determine pertains to the jurisdiction of the court. It is

claimed that the bank was not a party to the action, and hence was not bound by any orders of the court made in the case other than that to show cause; and, further, that if funds claimed by both parties to the suit were deposited in the bank, it was the direct interest of such parties as against the bank and which can only be enforced by an independent action upon their part. It is further contended that such action must be upon the bond of the bank and its sureties, wherein a summons must issue and run in the name of the people, etc. and that there is no statute authorizing a judgment, or decree, or motion, etc. These assignments are not well taken. If it is true, as alleged, that there are no statutory provisions regulating or providing for judgment by motion or citation in this class of cases, none are needed. It is a jurisdiction existing and which has been exercised from time immemorial. The funds borrowed were in the custody of the court and the bank which came into court and borrowed this money with knowledge of the conditions under which it was acquired made itself a quasi party to the action and was subject to the orders and decrees of the court; and is estopped to deny that it had not become such a quasi patry to the suit. In such case it was not necessary that a separate suit should be brought; in fact, under repeated decisions of the federal courts, and in some states where the question has been passed upon,

it is held that no separate or outside suit could have been brought to disturb these funds." Pages 314-315. Citing:

Corbitt vs. Farmers Bank et al, 114 Fed. 602.

Jones vs Merchants Nat. Bank, 76 Fed. 683, 35 L. R. A. 698.

Allen vs Gerard, 21 R. I. 467, 44 Atl. 592, 49 L. R. A. 351, 79 Am. St. R. 816.

Tuck vs. Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666.

"In addition, the bank appeared and defended the action, of which it had proper notice. A citation was issued and served upon it to appear and show cause why it should not pay this money. This it did by written pleadings the same as though summons had been served upon it. A trial was had upon the very issue herein involved in which it appeared and offered its evidence and presented arguments by its counsel upon the merits of the controversy. None of its rights in this respect are complained of. The practice was complied with the same as though it had been a party to the original case. For the purposes of the disposition of these funds pertaining to which the bank was a quasi party to the action, the court had jurisdiction to render a judgment against it. Uhl vs. Vohlmann, 52 App. Div. 455, 65 N. Y. Supp.

197, Vaughn vs. Tealey, 39 S. W. 868, Fisher vs. Cunningham, 58 S. W. 399." Page 315.

CORBITT VS. FARMERS BANK OF DELAWARE et al. 114 Fed 602.

"The question presented by the motion to abate the attachment in this cause is whether moneys paid into court pending litigation in regard theerto, and placed by order of the court in its registry or some other designated depository, pursuant to law are the subject of attachment enimating from another court. This question is one of importance, as it not only affects the orderly administration of justice in the several courts, but goes further, and tends, as in this case, to thwart and annul the carrying out of the court's judgment, in a case fully litigated, with the parties in interest before it. Money paid into the registry of the court, pursuant to law, can only be withdrawn therefrom, by the very terms of the act of congress providing for the deposit 'by the order of the judge, or the judges of said court, respectively, to be signed by such judges, or judges, and to be entered and certified of record by the clerk.' When a court causes funds to be so placed in its registry, they are to the credit of the court itself, there placed and held, to the end that its decrees and orders in respect thereto may be obeyed and carried out in accordance

with its judgment rendered; and no court, other than one having a supervisory power over the acts of such court, can by any act of its own, or any decree, order, or process emanating from it, except with its leave, assert any claim to, or secure any right in or lien upon such funds, so long as the same remain under its control. To entertain a contrary doctrine to this would not only work untold mischief and delay in legal poceedings, but would result in innumerable conflicts between the courts themselves; and the consequce would be that funds once paid into court with a view of having the rights of parties litigant thereto adjusted and determined, instead of being disposed of by the termination of the particular controversy, would be involved in an endless chain of litigation. This subject has been before the courts, state and federal, too frequently to admit now of serious cavil or doubt." Page 603-604.

"The position taken by counsel for complainant, that the court, having entered its final order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to the defendant bank, is equally fallacious. A conclusion in favor of parties litigant to any controversy would be barren of good, if the court rendering the decision

was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result, as to moneys in the court's own registry, would, indeed, leave it in a helpless and pitiable plight."

To same effect see Shelton vs. Wolthausen, 69 Atl. 1030, 1031.

GREGORY vs. MERCHANT'S NATIONAL BANK, (Mass.) 50 N. E. 520.

Bill in equity to obtain from defendant bank a sum of money received on deposit, amounting to $18,820, which was the proceeds of a promissory note to which the plaintiff contends that he was entitled. The note was claimed by other parties. A suit at law upon it was pending in the circuit court of the United States for the First circuit, and a suit in equity was pending in the same court to determine the rights of the respective claimants to it. There was also a submission to arbitration in pais, by the parties to the suit in equity, of the questions arising in that suit, and on award under the submission, the effect of which was in dispute. In this situation it was agreed by the claimants of the note that it should be delivered to John G. Stetson, who was at that time the clerk of the circuit court of the United States for the First circuit, to be retained by him subject to the joint order of the counsel of the respective claimants. Afterwards an order was entered by the court in said suit in equity, requiring

Mr. Stetson to file the note in the action at law above referred to, and directing the maker of the note, the defendant in that action, upon and after the entry of the judgment therein, as follows: "To pay into the registry of this court the amount of said judgment . . and that said amounts be held subject to the rights of the parties claiming said note, and to abide the decision of the court in this cause." Thereupon Mr. Stetson filed the note in court in accordance with the order. Judgment was entered in the action at law upon the note for the sum of $18,879.96, and the defendant in the action paid into court that sum in satisfaction of the judgment. On the same day, Mr. Stetson, the clerk of the court, took the money and deposited it with the defendant bank and received from the bank a pass book in the usual form, which showed that the money was deposited by the court in case No. 2435, Jones vs. Swift, which were the number and name of the action at law. All these facts are set out in the bill. A demurrer to the bill was sustained, and case appealed.

The court then cites Rev. Stat. of the U. S. Sec. 995, 996.

The court says:

> "While the bill does not expressly state that the defendant bank is a designated depository of the U. S. and that the money was deposited by the clerk in accordancewith his legal duty under he statute after the money had been paid into court, the averments of the bill warrant

other legal inference. It is well settled that the direct legal liability of a bank for money deposited subject to withdrawal by check is only to the depositor. Carr vs. Bank, 107 Mass. 45; Bank vs. Millard, 10 Wall. 152, Bank vs. Dodge, 124 U. S. 333. It is equally clear that if one seeks by a bill in equity to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit. To a suit in equity which has for its object the disposal of any trust fund, all known claimants of the fund must be made parties. Williams vs. Bankhead, 19 Wall. 563.

"The money claimed in this case was deposed by the circuit court of the United States and is held by the defendant bank subject to withdrawal only upon an order of one of the judges of that court. It is quite clear that no proper inquiry could be made in regard to the ownership of the fund without making the judges of the court parties. But the objection to the bill lies deeper than this. The money was paid into court under an order of court, and was held by the court in custodia legis. Whether the order under which it was paid was properly or improperly made cannot be determined upon a proceeding to obtain the money in another court. The circuit court, by virtue of the pending suit in equity, had jurisdiction of the subject and of the parties. No other court has jurisdiction of any question pertaining

to the disposition of the money which is held by that court. Claims upon the moneys are to be made in that court and to be heard and determined there. This was held in Gregory vs. Bank, 76 Fed. 683, 22 C. C. A. 483, a suit brought to obtain this same money. Any other doctrine would be at variance with the right of control of its own business which inheres in every court of justice, and would cause uncertainty and confusion in the determination of legal rights. It is plain that this suit cannot be maintained, because the judges of the United States court are not parties to it, and because this court has no jurisdiction to make them parties in a case of this kind, or to adjudicate upon questions which are properly cognizable only in that court. Tuck vs. Manning, 150 Mass, 211. 22 N. E. 1001, Book Co. vs. De Golyer, 115 Mass. 67. Whether the bill is fatally defective for want of other parties, on grounds intimated in Gregory vs. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, another suit to obtain possession of the proceeds of this note, it is unnecessary to determine.'' P. 521-522.

GREGORY VS. BOSTON SAFE DEPOSIT & TRUST CO. 53 N. E. 889.

Suit by Gregory against defendant. It appears that a suit in equity was pending in the circuit court

of the U. S. for the first Circuit involving the ownership of two promissory notes. One of these notes, which was for $20,334.60, with interest matured; and a suit was brought upon it in said circuit court by agreement of the claimants, and was prosecuted to judgment by their respective counsel, acting jointly. The amount of the judgment, $24,926.90 was paid into court, and was held in the registry in satisfaction of the judgment, for the benefit of the party to whom it should be decided the note belonged. Thereupon it was ordered by the court that this sum be transferred to the cause in equity, which was brought to determine the title to the note, to remain subject to the order of the court in that cause. Afterwards the plaintiff in the present suit filed in the equity cause a motion to have the money deposited with the Boston Safe Deposit and Trust Company so that it would draw interest. The court made an order to that effect.

On June 20th, 1896, a final decree was entered in the equity cause, that the remainder of the fund be paid to Mary H. Pike, the executrix of the original defendant, Frederick A. Pike, and on Sept. 21, 1896, it was "ordered that the following property in the registry of the circuit court in this cause, deposited, subject to the order of said court, in the Merchants National Bank of Boston, and in the Boston Safe Deposit & Turst Company, amounting in all," which included the deposit now in question, be paid over to said Mary H. Pike. The plaintiff contends that this court had no jurisdiction to make this order.

The court says:

"But we see no good grounds for this contention. The money came into the registry of the court in the cause in equity, apparently with the consent of all parties. It was deposited with the defendant, subject to the order of the court, upon the plaintiff's motion. The defendant has lawfully paid it out in accordance with the order of the court and the defendant cannot now be charged with it in a suit brought in a state court. The doctrine stated in Gregory vs. Bank, 171 Mass. 67, 50 N. E. 520, and in another case pending between the same parties in 22 C. C. A. 483, 76 Fed. 683, is decisive of this case."

JONES VS. MERCHANTS NAT. BANK OF BOSTON et al.

GREGORY VS. SAME.

GREGORY VS. BOSTON SAFE DEPOSIT & TRUST CO. 76 Fed. 683.

These are three bills, the first of which was filed by Charles F. Jones against the Merchants National Bank of Boston, the clerk of the circuit court, and his predecessor in office; the second by Charles A. Gregory against the Merchants National Bank of Boston and another; and the third by Charles A. Gregory against the Boston Safe Depos-

it & Trust Company and another; complainants in each case claiming title to funds in the custody of the bank and trust company as depositaries of the circuit court and praying that the same be paid over to them.

The court after going into the question as to how the money came into the custody of the defendant banks says:

> "Although, in response to the propositions of the appellants, we have thus gone into the details showing that these two funds came into the custody of the respective depositaries pursuant to orders of the court, yet we are not to be understood as now impeaching the broad proposition that the essential position would in all respects be the same if it appeared only that the funds had been transferred from the court to the depositaries by the act of the clerk, under color of authority from the court, so long as the act of the clerk remained without any disavowal by the court. The funds having thus accumulated in the respective depositories, the appellants, conceiving that they had an interest therein which had not been adjudicated to them, but without obtaining the leave of the court to proceed against them or the depositaries, and without any petition to the court asking leave to intervene in the usual way, filed these three bills, one against one of the depositaries, the present clerk of the circuit court, and his predecessors in office, one against the same deposi-

tary and a person in whose favor the circuit court has decreed an interest in the funds and the third against the other depositary and also the same person named in the second. Each bill claims title to the respective funds, and prays direct relief against the respective depositories in the particulars that they may respectively be decreed to pay the respective funds to the complainants.".....

"Our attention has been called to the want of parties, but we prefer to put our decision on such grounds as will protect the depositaries of the federal courts in this circuit from all such attemps to harass them. We doubt not these bills were filed entirely in consequence of a zealous desire to seek a remedy for a supposed right, and with no purpose beyond that. Yet the occasion requires us, now to state at large why proceedings of this character are not tolerated by the law, but only to declare the rule, so that no one can hereafter excuse himself for not regarding it. The futility of all such bills is sufficient to defeat them, because, not withstanding the pendency of one of them, the court having control of a fund may order the entire disposition of it summarily, thus leaving nothing for the bill to act on. A bill which can reach no result except by staying the ordinary and rightful exercise of the essential functions of the court is, by its character, so futile that it ought to be dismissed for that reason alone;

but it is enough to say that the rule that bills of this sort will not be tolerated is so fundamental, and so necessary to the full exercise of judicial functions, that the reasons on which it rests need not be further stated."

The court cites another phase of the case in Greggory vs. Pike, 77 Fed. 241.

GREGORY VS. BOSTON SAFE DEPOSIT & TRUST CO. 144 S. 665, 35 L. Ed. 585.

Suit was brought by Gregory and Jones against the Boston Safe Deposit and Trust Company and the Merchants National Bank and Mary H. Pike admistratrix of Frederick A. Pike, deceased, to obtain the amount of a judgment on deposit with said bank and trust company. The bill was dismissed. 36 Fed. Rep. 408, 414. An appeal was taken to the United States Supreme court, the court after referring to the decree of the court below that the moneys in the hands of the defendants the Boston Safe Deposit & Trust Co. and the Merchant's Nat. Bank were held by them subject to the orders of the court in equity suit No. 2170, in which case the moneys were deposited in court and that no orders relating to said moneys can properly be made in this suit and dismissing the bill, says:

"We are of opinion that the questions attempted to be raised by the present suit should

have been presented and can be affectively determined only in equity cause No. 2170."

DISCUSSION OF CASES CITED BY PLAINTIFF IN ERROR

Plaitiff in Error cites 13 Cyc 1036 to the effect that a deposit in court if it was made on a condition with which the other party refuses to comply may be wihdrawn by the depositor as a matter of right, and the text refers to Cummins vs. Rapley, 17 Ark. p. 381. In reference to this authority will say, that the facts of the case show that the court never took control of this money in any form nor was any order ever made by the court in reference thereto. The Rapleys deposited certain money with the clerk, Cummins refused to accept it and after the case was decided the Rapleys withdrew the money. The money in this case cited by the defendants in error never came into custodia legis. If the law required the clerk to deposit the money with the county treasurer and the county treasurer in a county depository, and the money had been deposited with the clerk under an order of the court an entirely different question would have been presented.

The case of Harrington vs. LaRoque, 13 Or. pp. 344, which is cited by the plaintiff in error simply

holds that after the court has ordered the money paid it is no longer in custodia legis. We agree with the court and cite the same case as squarely for us. When the circuit court of Coos county, Oregon orders the money paid to the person to whom it belongs it will then, *and not sooner,* no longer be in custodia legis. "In order to complete a deposit the money must be delivered pursuant to an order of the court. Otherwise the delivery will have no legal effect." 13 Cyc 1036. "The fund must ordinarily come into the actual physical possession of the court else there is no effective deposit." 13 Cyc 1035.

This rule applies to the case of Fleischner vs. Bank of McMinneville, 36 Or. 553, 561 cited by plaintiff in error. Authorities have frequently held that property in the hands of an assignee for the benefit of creditors is not in custodia legis.

An examination of Lang vs. Railroad, 160 Fed. 355 and Mount City vs. Castlemean, 187 Fed 921, 924, in no wise limits the doctrine contended for by the defendants in error.

The facts in the case of Moran vs. Sturges, 154 U. S. 256 and in Buck vs. Colbath, 3 Wall. 334, 345, cited by plaintiff in error do not present a case of a court attempting to get control of property in the custody of another court after the litigation was ended. If the case of Buck vs. Colbath, attempts to enunciate a doctrine that when money is in the custody of the court that it ceases to be in such custody the moment final decree or judgment is en-

tered, it is dictum and is controverted by later decisions of the United States supreme court and all the authorities of state courts. That part of the quotation taken from Buck vs. Colbath, that when "the possession of the officer or Court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them" is correct. When litigation is ended there is generally an order or a judgment covering all deposits in court and of course when that is done other courts have jurisdiction. In the case at bar, there has never been any order of court attempting to direct any of the parties or any of the officers of the court as to the disposition of the fund, and the property is still in custodia legis.

In the case of Dunn vs. Hunt, 78 N. W. 1110 cited by plaintiff in error, the facts show that the plaintiff obtained an order allowing him to withdraw the money; of course after that the defendant could not claim that the money was still in custodia legis and the court was right in saying that the defendant never had any claim to or lien upon the money merely because it was paid into court.

The case of Lerous vs. Baldus, 13 S. W. 1019 cited by plaintiff in error is so self explanatory and so clearly not in point that we content ourselves with the citation as given by the plaintiff in error in its brief.

The same statement applies to the case of Wilbur vs. Flannery, 15 Atl. 203, 60 Vt. 581 cited by the plaintiff in error.

Again at section 1375, this author states:

> "The action can be maintained only to recover either money or the equivalent of money. In order to maintain an action for money had and received it is necessary to establish that defendants have received money belonging to the plaintiff or to which he is in equity and good conscience entitled."

Now applying these rules to the case at bar, we find that the circuit court of Coos County made an an order that

> "Upon the payment to the Clerk of this Court by the plaintiff, of the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as Tax Collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of the United States of America vs. Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the Complaint shall be held to be the prop-

erty of the United States then said money so deposited to the Clerk shall be returned to the plaintiff, but if it be therein decided that said real estate does not belong to the United States then said money shall be paid over by the Court to the defendant herein; *unless it shall meanwhile otherwise be ordered by this Court.* It is further ordered that the defendant W. W. Gage, as Sheriff and Tax Collector of said county, do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes, and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a judge thereof."

This order was made July 3rd, 1912 (Transcript of Record, p. 8) and remained in force until July 3rd, 1914 when the court made an order and decree dismissing the suit, (Transcript of Record, p. 10). The Southern Oregon Company appealed to the supreme court of Oregon which affirmed the lower court and mandate was sent down and entered on May 22nd, 1915, (Transcript of Record, p. 11.) It was not until November 30th, 1915, that the Sheriff under this litigation found himself free to issue certificates of delinquency (Transcript of Record, p. 11) and he did issue such certificates at such time and proceedings for the foreclosure of these certificates were had by the service of summons and

the filing of a complaint on March 29th, 1916. Pursuant to the order of the court the money alleged in the amended complaint was brought into court and deposited with the clerk. It then became the duty of the clerk of the court under Section 5 of Chapter 273 of the General Laws of Oregon, 1913, to deposit this money with the county treasurer and the duty of the couny treasurer to place it in safe keeping with a bank in his name as county treasurer.

Now let us apply the law set forth in Elliott on Contracts aforesaid, and which is the law as enunciated by the supreme court of Oregon and the courts generally. Did the county clerk obtain this money through some mistake? Some misapprehension of the facts? Some forgetfulness ot the facts? Did he obtain this money by fraud? Was he entitled to take this money when the court ordered it paid to him? When he obeyed the order of the court did he act in good conscience? When he received the money did he violate any duty when he complied with section 5 of Chapter 273 of the General Laws of Oregon, 1913, which command him to pay the money to the county treasurer?'' Is the clerk under any legal obligation to pay this money to any one until the circuit court of Coos county orders it repaid?

Did the treasurer receive this money in equity and good conscience? Shall he pay it to the plaintiff on demand when the law says he shall pay it out in accordance with the order of the court? Is

he under any legal obligation to any one except the order of the Circuit Court or some court having a direct supervisory control over the circuit court, such as the supreme court of Oregon or, on writ of error from the supreme court of Oregon, the Supreme Court of the United States?

The mere statement of these questions presents the inevitable answer. An action for money had received will not lie.

MISJOINDER OF PARTIES DEFENDANT

A joint action for money had and received can be maintained only against defendants who have jointly received the money.

Coward vs. Fender, Ann. Cas, 1913, A. p. 932.

The defendants never received the money jointly. The money was paid to the clerk under the order of the court, the clerk paid it to the treasurer under the county depository law, the treasurer deposited it in one of the county depository banks under this law which now holds it subject to the county treasurer's check. Alfred Johnson, Jr., the present sheriff never received this money at all, the present county clerk only received a part of the money, Coos county, unfortunately, never received any of the money at all and is now prosecuting its tax foreclosure case to collect the taxes due on these lands.

We contend in conclusion that the plaintiff in error cannot prevail herein for the three reasons hereinbefore set out, to-wit: (1) This money is still in the custody of the circuit court of Coos county, Oregon and that court alone has power to order a distribution of the fund to the person lawfully entitled thereto; (2) None of the defendants have any money of the plaintiff which in equity and good conscience belongs to the plaintiff and which they are under a legal obligation to pay to it, the entire obligation being to the Circuit Court of Coos County, Oregon; (3) This money was never paid to the defendants jointly.

We respectfully submit that the judgment of the District Court should be affirmed.

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